**LEONG LAI KUEN**

**v.**

**SENTUL MURNI SDN BHD**

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[SUMMONS WRIT NO: 22-1008-2002]
30 SEPTEMBER 2003

***CONTRACT:*** *Sale and purchase of property - Breach - Non-delivery of vacant possession - Claim for liquidated damages - Whether claim should be based on formulated sum stipulated in sale and purchase agreement - Whether claim should be a reasonable sum subject to s. 75 Contracts Act 1950*

***LAND LAW:*** *Housing developers - Non-delivery of vacant possession - Purchaser's entitlement to compensation - Whether compensation should be based on formulated sum stipulated in sale and purchase agreement - Whether compensation should be a reasonable sum subject to s. 75 Contracts Act 1950*

The plaintiff rescinded a sale and purchase agreement ('S & P') for the purchase of a condo unit and claimed damages against the defendant developer for non-delivery of vacant possession. The defendant had abandoned the construction of the said property after payments up to 45% of the purchase price had been paid. The defendant's defence was a plea of frustration of contract due to a dispute pertaining to squatters on the land where the said property was being built. The defendant conceded to liability as despite the fact that there were court orders and disputes with the squatters over the said land, the defendant had continued to build on it. However, although the defendant submitted that the sum paid by the plaintiff ought to be returned, it refused to concede to the plaintiff's claim for liquidated damages. The plaintiff's claim for liquidated damages was based on a calculation of interest on a day to day basis for delay in handing over vacant possession of the said property as stipulated in the S & P.

The issues: (1) whether the plaintiff could claim damages under a rescinded contract; and (2) whether the claim for liquidated damages for non-delivery of vacant possession should be based on the formulated sum stipulated under the S & P.

**Held:**

**[1]** Based on the authorities, the plaintiff had a right to claim for damages specified under a rescinded contract. However, the claim for liquidated damages for non-delivery of vacant possession would be subjected to s. 75 of the Contracts Act 1950. The plaintiff was only entitled to receive from the defendant reasonable compensation not exceeding the amount so named or the penalty stipulated for. The court has to decide what is reasonable. Otherwise, damages due to a purchaser under the formulated method of calculation stipulated in the agreement may amount to a colossal sum for an abandoned project. The purchaser may refuse to rescind or choose to rescind at a very late stage so as to enjoy the higher rate of calculating compensation. (pp 31 b & 32 d-h)

*[Claim for damages allowed but a reasonable compensation not exceeding the sum claimed by plaintiff to be assessed by senior assistant registrar.]*

**Case(s) referred to:**
*Chye Fook & Anor v. Teh Teng Seng Realty Sdn Bhd [1989] 1 MLJ 308* ***(refd)***
*Johnson v. Agnew [1979] 1 All ER 883* ***(refd)***
*Kang Yoon Mook Xavier v. Insun Development Sdn Bhd [1995] 2 CLJ 471* ***(refd)***
*Mcdonald v. Dennys Lascelles Ltd [1933] 48 CLR 457* ***(refd)***
*Tan Yang Long v. Newacres Sdn Bhd [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666* ***(refd)***

**Legislation referred to:**
Contracts Act 1950, ss. 57(1), (2), 75, 76

**Other source(s) referred to:**
Pollock & Muller, *Indian Contract and Specific Relief Acts*, 11th edn, vol 2, p 801

*For the plaintiff - CW Leong; M/s Tee, Tan & Partners*
*For the defendant - Malcolm Fernandez; M/s Norman Fernandez & Assoc*

*Reported by Usha Thiagarajah*

## JUDGMENT

**James Foong J:**

**Introduction**
The plaintiff purchased a unit of condominium (the said property) from the defendant, who was the developer. As evidence of this purchase, a sale and purchase agreement (S & P Agreement) was executed between the parties on 2 February 1994. The purchase price was RM99,800. Towards this, the

plaintiff had paid to the defendant, by way of progress payments, a sum of RM44,910 which represents 45% of the total consideration. The stage of work specified as completed on the said property is up to "walls and partitions including floors and window frames". This is evidenced from the last progress claim made by the defendant on 6 October 1997. After this, work was abandoned.

Dissatisfied with this state of affairs, the plaintiff gave notice on 1 October 2001 in writing to the defendant to recommence construction. The defendant did not comply. Consequently, the plaintiff by letter dated 21 August 2002 terminated the S & P Agreement. This was soon followed by a writ of summons against the defendant where the plaintiff claims:

(a) a declaration that the defendant had breached the terms of the S & P Agreement and the plaintiff is entitled to rescind the same on 21 August 2002;

(b) that the defendant do refund to the plaintiff a sum of RM44,910;

(c) interest of 8% per annum on the sum of RM44,910 from date of filing of writ to date of full settlement;

(d) the defendant do pay the plaintiff damages of: (1) RM55,395.84 in accordance to cl. 22(2) of the S & P Agreement; (2) RM11,079.16 in accordance to cl. 24(2) of the S & P Agreement, both running from 23 February 1997 till 21 August 2002 or such date as the court thinks fit;

(e) interest at 8% per annum on both RM55,395.84 and RM11,079.16 from date of filing to date of full settlement,

(f) cost;

(g) and any other relief as this court thinks fit and suitable to grant.

The defendant's defence is a plea of frustration of contract for the following reasons: On 27 April 1994, the High Court at Kuala Lumpur granted an order for the squatters on the land where the condominium is built be evicted. Some of these squatters appealed to the Federal Court and obtained therefrom a stay of execution order pending appeal. The appeal was heard but it was decided that the merits of the dispute should be tried.

In 1996 the defendant filed another action against four other remaining squatters. The High Court granted vacant possession to the defendant on condition that the defendant should pay compensation, which is to be assessed by an independent valuer, to occupants of the land. Dissatisfied, the plaintiff appealed to the Court of Appeal against this decision. This appeal was dismissed on 28 August 1998.

**Mode Of trial**

At the outset both parties agreed that the trial of this suit be proceeded in the following manner: (a) the dispensation of oral testimony; (b) based on the agreed facts submitted by the parties and the bundle of documents prepared by them; (c) written and oral submissions.

**Conceded Claims**

At the initial stage of the oral submission, Mr. Malcolm Fernandez, counsel for the defendant candidly conceded to the issue of liability after this court commented that the Court Orders, seemingly in favour of the squatters, did not prevent the defendant from building on the said land. This is reflected from the defendant's progress claim on the plaintiff where the defendant declared that the "walls and partitions including floors and window frames" of the condominium are completed. If this stage of construction was achieved despite the Court Orders and the disputes with the squatters over access to the land then these circumstances would not justify the defendant for exemption from liability under s. 57(1) and (2) of the Contracts Act – an agreement to do an impossible act.

With such concession, the only issue left for discussion is the quantum of damages. Even on this, Mr. Malcolm Fernandez submits that the sum of RM44,910 received by the defendant from the plaintiff ought to be returned. Obviously he must have considered the doctrine of restitution. Naturally, this comes with the interest of 8% per annum thereon as prayed for by the plaintiff; an item this court is minded to grant.

**Disputed Claim**

But Mr. Malcolm Fernandez refused to concede to the plaintiff's claim for liquidated damages of a sum of RM55,395.84 and RM11,079.16 in accordance to cl. 22(2) and 24(2) respectively in the S & P Agreement. He argued that this is untenable since damages for rescission, according to him, should be assessed, not based on the formula set out under the S & P Agreement for delay in delivery of vacant possession of the said property.

Mr. Leong, counsel for the plaintiff, was adamant on his view that the law allows the plaintiff to claim such liquidated damages with interest attached thereto as set out in prayers (d) and (e) above. He stressed that repudiation of the S & P Agreement does not prevent the plaintiff from claiming such sums formulated on the basis of late delivery of the said property as set out in the S & P Agreement. He cited a number of authorities in support which I shall deal with shortly in my analysis of this issue.

But before I venture further, it is best to explain why specific dates and certain provisions of the S & P Agreement were selected by the plaintiff for calculation of her liquidated damages.

Under cl. 22(2) of the S & P Agreement vacant possession of the said property is to be delivered to the plaintiff within 36 months from date of agreement. This would put the last date for delivery of vacant possession to 1 February 1997. The agreed damages stipulated for late delivery is 10% per annum of the purchase price calculated on daily basis.

Under cl. 24(2) of the S & P Agreement there is a separate provision for the defendant to complete the common facilities of the condominium. It is also 36 months from date of agreement and the last date for completion was 1 February 1997. Any delay will subject the defendant to pay the plaintiff a penalty of 10% per annum of the last 20% of the purchase price calculated on daily rest. This 20% amounts to RM18,960.

Having set out the facts and figures, I shall now proceed to analyze whether such claim by the plaintiff should be entertained.

**Analysis**

Firstly, s. 76 of the Contracts Act provides:

> A person who rightly rescinds a contract is entitled to compensation for any damages which he has sustained through the non-fulfillment of the contract.

The principle for the award of compensation is: the injured party should as far as possible be placed in the same position in terms of money as if the contract had been performed by the party in default – see Pollock & Muller on *'Indian Contract and Specific Relief Acts'*, 11th edn, vol. 2 at p. 801. But in cases where the breach of the contract consist in a failure to transfer property, according to *'Mcgregor on Damages'* 16th edn at p. 25, the basis for ascertainment of loss is the market value of the

property, always deducting the contract price if it has not already paid to the person in breach. But this is not what the plaintiff wants. She is asking for damages based on calculation of interest on a day to day basis for delay in handing over vacant possession of the said property as specified in the aforesaid provisions of the S & P Agreement. Can she succeed especially when the S & P Agreement is rescinded?

On the question of her right to claim under the contract after the same is rescinded the following cases provided the answer in the positive.

In *Johnson v. Agnew* [1979] 1 All ER 883 the House of Lords accepted this dictum of Dixon J of Australia in the Australian case of *Mcdonald v. Dennys Lascelles Ltd* [1933] 48 CLR 457 at p. 476:

> When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be to the position they occupy before the contract made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined as far as it is executory only and the party in default is liable to damages for its breach.

Our courts have adopted this proposition through a series of cases beginning with *Chye Fook & Anor. v. Teh Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308. In this case, the plaintiff was the purchaser of a house to be built by the defendant. The completion date for the house was 24 months from the date of signing of the sale and purchase agreement and failure to comply would subject the defendant to liquidated damages of 10% per annum of the purchase price calculated on a day to day basis. The defendant failed to complete within the stipulated date and the defendant rescinded the agreement. Arguing against the plaintiff's rights to rescind the contract, the defendant contended that the presence of the default clause which provided liquidated damages demolishes such recessionary right of the plaintiff. This did not find favour with the court which accepted the proposition of *Johnson v. Agnew (supra)*.

*Chye Fook & Anor. v. Teh Teng Seng Realty Sdn Bhd (supra)* was favourably cited in *Tan Yang Long v. Newacres Sdn Bhd* [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666 and *Kang Yoon Mook Xavier v. Insun Development Sdn Bhd* [1995] 2 CLJ 471.

Having established that the plaintiff has a right to claim damages specified under a rescinded contract, the next issue is whether she is entitled to the liquidated damages specified in the S & P Agreement for non delivery of possession of the said property?

On this, two cases throw some light. The first is from the *obiter dictum* of Abdul Malek J (as he then was) in *Chye Fook & Anor. v. Teh Teng Seng Realty Sdn Bhd (supra)*:

> At this stage of the proceedings, this court was not asked to determine whether the rescission would result in the plaintiffs not being able to receive the liquidated damages but in passing I would say that, as provided by s. 76 of the Contracts Act 1950, a party who lightly rescinds a contract is entitled to compensation for any damage which he has sustained through the nonfulfilment of the contact. I had in fact made it clear in my ruling that the plaintiffs' entitlement to liquidated damages if the developer failed to complete within 24 months did not in any way take away the rights of the purchaser to rescind the contract.

The second is *Kang Yoon Mook Xavier v. Insun Development Sdn Bhd (supra).* The facts of this case are these: the plaintiff entered into a sale and purchase agreement for a house to be built by the defendant developer. The defendant failed to deliver the house within the stipulated time specified in the agreement.

The plaintiff sort to terminate the agreement by requesting from the court *inter alia*: (a) a declaration that the agreement is terminated; (b) the return of any sum so paid by the plaintiff under the agreement; (c) liquidated damages calculated at the rate of 10% per annum on the purchase price on daily rest from date when vacant possession of the said house was supposed to be delivered to the plaintiff until date of rescission of the agreement; (d) in the alternative damages for breach of contract. The court allowed prayers (a), (b) and (c).

Though the facts in *Kang Yoon Mook Xavier v. Insun Development Sdn Bhd (supra)* is rather similar to our present situation where the project is abandoned, yet despite allowing a claim for liquidated damages based on the calculation specified in the contract for late delivery, which could easily be ascertained on the spot, the learned judge ordered the senior assistant

registrar to assess the same. In our present case, the exact amount is even spelt out in the statement of claim. By directing assessment to be conducted by the senior assistant registrar, could the learned judge in *Kang Yoon Mook Xavier v. Insun Development Sdn Bhd (supra)* be sharing my fear that such sum under the formula provided for late delivery may amount to such an enormous sum that it is not equitable to the developer. Imagine a purchaser of an abandon project elects to rescind his contract at a very late date despite having advance knowledge that the developer is not proceeding with the project. In *Kang Yoon Mook Xavier v. Insun Development Sdn Bhd (supra)* it was six years from due date of delivery of vacant possession to date of rescission. In our present case it is approximately 5 1/2 years. By such delay in exercising his rights the purchaser may be taking advantage of the more attractive benefits set out in the artificial formula for computation for late delivery. The aggregate may even exceed the total value of the house, if it is completed. Would this not be defeating the very objective of compensation?

Though I agree with the proposition that rescission of the S & P Agreement by the plaintiff does not disqualify her from her entitlement to liquidated damages spelt out in the said agreement but such formulated sum to my mind would be subjected to s. 75 of the Contracts Act. This provision provides:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

In this case the contract has been broken. A sum is named in the contract as the amount to be paid to the plaintiff and this is derived from a technique or method of calculation. Or alternatively, this could be considered a penalty. But the plaintiff, under the law is only entitled to receive from the defendant who has broken the contract "reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for". To determine what is reasonable the court has to decide. This is a more equitable approach otherwise, as I have expressed, damages due to purchaser under the artificial formulated method of calculation stipulated in the agreement may amount to colossal sum for abandon project where the purchaser refused to rescind or chose to rescind at a very late stage to continue to enjoy the higher rate for calculation of compensation.

**Conclusion**

For reasons stated, I allow a claim for damages as requested for in prayer (d) but the amount of reasonable compensation not exceeding sum so named by the plaintiff in prayer (d) above is to be assessed by the senior assistant registrar. Once assessed, it will carry an interest of 8% per annum thereon from date of filing to date of full settlement.

As for prayer (a), (b) and (c), there shall be order in terms.

There shall be cost to the plaintiff.